

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DR. SUJATA VYAS, an individual,

Plaintiff,

v.

BHASKAR VYAS, an individual; NANCY BUNN, an individual; LOCKHEED MARTIN PENSION PLAN AND CHAMBERS QDRO CONSULTING SERVICES, LLC; CHARLES SCHWAB AND SCHWAB RETIREMENT PLAN SERVICES COMPANY AS PLAN ADMINISTRATOR; COMMITTEE SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP (SCPMG) PLAN ADMINISTRATOR; and DOES 1 through 100, inclusive,

Defendants.

CV 15-02152 RSWL (DFMx)

ORDER re: DEFENDANT SCHWAB RETIREMENT PLAN SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT [125]; PLAINTIFF DR. SUJATA VYAS' MOTION FOR SUMMARY JUDGMENT [126]

Currently before the Court are the following Motions: (1) Defendant Schwab Retirement Plan Services, Inc.'s ("Schwab") Motion for Summary Judgment ("Schwab's Motion") [125]; and (2) Plaintiff Dr. Sujata

Vyas' ("Plaintiff") Motion for Summary Judgment ("Plaintiff's Motion") [126]. Having reviewed all papers submitted pertaining to these Motions, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS** Schwab's Motion. The Court **DENIES** Plaintiff's Motion.

I. BACKGROUND

A. Factual Background

Plaintiff is a California resident who married Defendant Bhaskar Vyas ("Defendant Vyas") in 1981. Second Am. Compl. ("SAC") ¶ 21, ECF No. 63. During the couple's marriage, Plaintiff enrolled in the Southern California Permanente Medical Group ("SCPMG") Keogh Plan ("Keogh Plan") and the SCPMG Tax Savings Retirement Plan ("401(k) Plan") (collectively, "the Plans"). Id. ¶ 14a-b.

SCPMG Retirement Committee is the Plan Administrator of the Plans. See Decl. of John G. McGlynn in Supp. of Schwab's Mot. for Summ. J. ("McGlynn Decl."), Ex. 1 at 61, ECF No. 127-2; id., Ex. 2 at 3, ECF No. 127-3. SCPMG Retirement Committee engaged Schwab as a recordkeeper of the Plans. Id., Ex. 4 at 11, ECF No. 136-2; id., Ex. 5 at 1, ECF No. 136-3. Under the Recordkeeper Services Agreement for the Keogh Plan, Schwab "is not a fiduciary to the Plan and does not have any fiduciary responsibility with regard to the administration of the Plan or the management of the Plan's assets." Id., Ex. 5 at 10. The Keogh Agreement also provides, "The Plan Sponsor

1 agrees that it, the Plan Administrator and/or other
2 properly designated Plan fiduciary, if any, and not
3 [Schwab] or its affiliates, shall have sole and
4 absolute discretionary authority over the Plan and Plan
5 assets." Id. at 9. Schwab will execute various
6 transactions "only after receiving the appropriate
7 direction from the Plan Sponsor, Participants,
8 Investment Manager(s), named representative(s) or other
9 properly identified fiduciary(ies)." Id. The 401(k)
10 Service Agreement contains similar terms. See id., Ex.
11 4 at 11.

12 Plaintiff and Defendant Vyas separated in 2003, and
13 in 2009, they obtained a Judgment of Dissolution from
14 the Orange County Superior Court finalizing their
15 divorce. SAC ¶ 5. Following the Orange County
16 Superior Court entering the Judgment of Dissolution in
17 2009, Defendant Nancy Bunn, the court-appointed
18 attorney, began drafting QDROs regarding the retirement
19 plans to which the couple contributed during the
20 marriage, including the Keogh Plan and 401(k) Plan.
21 Id. ¶ 7.

22 On May 21, 2015, the Orange County Superior Court
23 approved the QDROs regarding the Keogh Plan and the
24 401(k) Plan. See Def.'s Req. for Judicial Notice
25 ("RJN"), Exs. 1, 2, ECF No. 129. The 401(k) Plan QDRO
26 provides that the Superior Court "shall retain
27 jurisdiction to enforce this Order." Id., Ex. 1 at 5.
28 The Keogh Plan QDRO also provides that the Superior

1 Court "reserves jurisdiction over the parties and the
2 Plan until such time as the obligation for the Plan to
3 the Alternate Payee under this Order has been fully
4 paid and discharged." Id., Ex. 2 at 3.

5 With regards to the distribution of Defendant Vyas'
6 share of the funds in the Keogh Plan, the QDRO stated:

7 Such amount shall be segregated pro rata from
8 each of the Participant's Fund Accounts, other
9 than the Participant's Self Directed Fund
10 Account, if any, as such other Fund Accounts are
11 constituted as of the Plan's Valuation Date,
12 coinciding with or immediately preceding the
segregation date, and then from the
Participant's Self-Directed Fund Account, but
only to the extent the amount segregated exceeds
the amounts in the Participant's other Fund
Accounts.

13 Id. at 3.

14 In June 2015, Plaintiff alleges that Schwab moved
15 approximately \$200,000 of Plaintiff's separate property
16 from the Self-Directed Fund Account to satisfy
17 Defendant Vyas' community share in the Keogh Plan. SAC
18 ¶ 27. Plaintiff claims that there were sufficient
19 community funds in the Keogh Plan assets to satisfy
20 Defendant Vyas' community share, so taking the separate
21 property was unnecessary and in violation of the QDRO.
22 Id. ¶ 31.

23 On October 21, 2015, the Superior Court approved an
24 amended QDRO for the Keogh Plan. Id., Ex. 3. The
25 amended QDRO included a paragraph allowing the Plan
26 Administrator to put a hold on the assets in the Keogh
27 Plan "in the event that Participant, Alternate Payee or
28 any other party claiming rights under this Order shall

1 make any claim which the administrator of the Plan
2 ('Plan Administrator') shall determine to be
3 inconsistent with the provisions of this Order or with
4 any provisions of [ERISA]." Id. at 5. The QDRO for
5 the 401(k) Plan did not include this same provision.

6 Plaintiff filed her Complaint [1] on December 28,
7 2015. Consequently, on January 12, 2016, SCPMG
8 Retirement Committee instructed Schwab to place a hold
9 on Plaintiff's accounts in both the 401(k) and Keogh
10 Plans. Decl. of Cathleen S. Morisako in Supp. of
11 Schwab's Mot. for Summ. J. ("Morisako Decl.") ¶ 2, ECF
12 No. 127-11.

13 In June 2016, Plaintiff requested a distribution of
14 funds from the 401(k) Plan, but, due to the hold placed
15 on the Plans, SCPMG Retirement Committee informed
16 Plaintiff that she could not take a distribution until
17 the litigation ended. Decl. of Dr. Sujata Vyas in
18 Opp'n to Schwab's Mot. for Summ. J. ("Pl.'s Opp'n
19 Decl.") ¶ 1, ECF No. 139-3.

20 **B. Procedural Background**

21 Plaintiff filed her Complaint on December 28, 2015
22 against her ex-husband, Defendant Vyas; the drafter of
23 the QDROs, Nancy Bunn; Lockheed Martin Pension Plan and
24 Administrator, the alleged administrator of the
25 Lockheed Plan; Chambers QDRO Consulting Services, LLC,
26 another alleged administrator of the Lockheed Plan; and
27 Kaiser Permanente Pension Plan and Administrator, the
28 alleged administrator of the Keogh Plan and 401(k) Plan

1 [1].

2 Following Defendant Vyas' filing of his Motion to
3 Dismiss Plaintiff's Complaint [10], Plaintiff filed her
4 First Amended Complaint ("FAC") on April 5, 2016 [19].
5 The FAC again named Bhaskar Vyas; Nancy Bunn; Lockheed
6 Martin Pension Plan; and Chambers QDRO Consulting
7 Services, LLC as Defendants. Plaintiff added Schwab as
8 a Defendant. Inexplicably, Plaintiff dropped Kaiser
9 Permanente Pension Plan and Administrator from the
10 suit, and the Court dismissed this entity on April 5,
11 2016. Defendant Chambers QDRO Consulting Services, LLC
12 ("Defendant Chambers") filed a Motion to Dismiss
13 Plaintiff's FAC on August 22, 2016 [42].

14 Following the Court's grant of Defendant Chambers'
15 Motion to Dismiss with leave to amend [62], Plaintiff
16 filed her Second Amended Complaint ("SAC") on November
17 24, 2016 [63]. In the SAC, Plaintiff added SCPMG as a
18 Defendant. Because Plaintiff did not seek leave to
19 amend to add a new defendant, the Court dismissed SCPMG
20 on May 8, 2017. See Order re Pl.'s Mot. for Leave to
21 File Third Am. Compl. 19:3-7, ECF No. 96.

22 On August 31, 2017, Schwab filed its Motion for
23 Summary Judgment [125], and Plaintiff filed her Motion
24 for Summary Judgment [126]. On September 12, 2017,
25 Plaintiff filed her Opposition to Schwab's Motion
26 [139], and Schwab filed its Opposition to Plaintiff's
27 Motion [138]. On September 19, 2017, Schwab filed its
28 Reply in support of its Motion [155], and Plaintiff

1 filed her Reply in support of her Motion [156].

2 III. DISCUSSION

3 A. Legal Standard

4 Federal Rule of Civil Procedure 56 states that a
5 "court shall grant summary judgment" when the movant
6 "shows that there is no genuine dispute as to any
7 material fact and the movant is entitled to judgment as
8 a matter of law." A fact is "material" for purposes of
9 summary judgment if it might affect the outcome of the
10 suit, and a "genuine issue" exists if the evidence is
11 such that a reasonable fact-finder could return a
12 verdict for the non-moving party. Anderson v. Liberty
13 Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence,
14 and any inferences based on underlying facts, must be
15 viewed in the light most favorable to the opposing
16 party. Twentieth Century-Fox Film Corp. v. MCA, Inc.,
17 715 F.2d 1327, 1329 (9th Cir. 1983). In ruling on a
18 motion for summary judgment, the court's function is
19 not to weigh the evidence, but only to determine if a
20 genuine issue of material fact exists. Anderson, 477
21 U.S. at 255.

22 Under Rule 56, the party moving for summary
23 judgment has the initial burden to show "no genuine
24 dispute as to any material fact." Fed. R. Civ. P.
25 56(a); see Nissan Fire & Marine Ins. Co. v. Fritz Cos.,
26 210 F.3d 1099, 1102-03 (9th Cir. 2000). The burden
27 then shifts to the non-moving party to produce
28 admissible evidence showing a triable issue of fact.

1 Nissan Fire & Marine Ins., 210 F.3d at 1102-03.
2 Summary judgment "is appropriate when the plaintiff
3 'fails to make a showing sufficient to establish the
4 existence of an element essential to [her] case, and on
5 which [she] will bear the burden of proof at trial.'" Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795,
6 805-06 (1999)(quoting Celotex Corp. v. Catrett, 477
7 U.S. 317, 322 (1986)).

8
9 The standard for a motion for summary judgment
10 "provides that the mere existence of *some* alleged
11 factual dispute between the parties will not defeat an
12 otherwise properly supported motion for summary
13 judgment; the requirement is that there be no *genuine*
14 issues of *material* fact." Anderson, 477 U.S. at 247-
15 48.

16 **B. Analysis**

17 1. Schwab's Request for Judicial Notice is GRANTED

18 Schwab seeks judicial notice of the following
19 documents: the QDRO filed on May 21, 2015 regarding the
20 401(k) Plan; the QDRO filed on May 21, 2015 regarding
21 the Keogh Plan; and the Amended QDRO filed on October
22 21, 2015 regarding the Keogh Plan. See RJN ¶ 1-3.
23 This Court has the ability to judicially notice state
24 court filings and judgments. See Burbank-
25 Glendale-Pasadena Airport Auth. v. City of Burbank, 136
26 F.3d 1360, 1364 (9th Cir. 1998)(taking judicial notice
27 of court filings in a state court case where the same
28 plaintiff asserted similar and related claims); Hott v.

1 City of San Jose, 92 F. Supp. 2d 996, 998 (N.D. Cal.
2 2000)(taking judicial notice of relevant memoranda and
3 orders filed in state court cases). Because the QDROs
4 are orders in a state court case that forms the basis
5 for the instant Action, the Court **GRANTS** Schwab's
6 Request for Judicial Notice in its entirety.

7 2. Schwab's Evidentiary Objections

8 a. *Evidence in Support of Plaintiff's Motion*

9 i. *Exhibit 1*

10 As Exhibit 1 in support of her Motion, Plaintiff
11 includes a number of unidentified documents, which
12 relate to Schwab's advertised services with regards to
13 retirement plans. See ECF No. 128-1. Plaintiff has
14 included no declaration along with these documents; nor
15 does she make any attempt to authenticate them other
16 than by including random digital post-it notes on
17 several of the pages. Id. The Court does not rely on
18 what Schwab and its affiliates advertise as their
19 services in making a decision regarding Schwab's
20 fiduciary status in this matter. These advertisements
21 are irrelevant to the functions Schwab performed with
22 regards to the 401(k) and Keogh Plans. Therefore, the
23 Court **OVERRULES as MOOT** Schwab's objections to Exhibit
24 1.

25 ii. *Statement of Uncontroverted Facts*

26 Schwab objects to the majority of statements
27 contained in Plaintiff's Statement of Uncontroverted
28 Facts, ECF No. 128-6. Many of Schwab's objections "are

1 boilerplate and devoid of any specific argument or
2 analysis as to why any particular exhibit or assertion
3 in a declaration should be excluded," and therefore,
4 the Court **OVERRULES** each of these objections. See
5 Amaretto Ranch Breedables v. Ozimals, Inc., 907 F.
6 Supp. 2d 1080, 1081 (N.D. Cal. 2012)("This Court need
7 not address boilerplate evidentiary objections that the
8 parties themselves deem unworthy of development, and
9 the Court accordingly summarily overrules the
10 objections." (internal citations omitted)). Below, the
11 Court discusses those objections for which Schwab has
12 provided further argument.

13 Schwab objects, based on lack of personal knowledge
14 and foundation, to the statement, "On or about June
15 2015, Schwab placed a freeze on Plaintiff's 401k
16 account." See Def.'s Evid. Objs. to Pl.'s Mot. 4, ECF
17 No. 138-1. While Plaintiff states in her Declaration
18 that she is a participant of the 401(k) Plan and when
19 she tried to access her 401(k) Plan account the account
20 was frozen, see Decl. of Dr. Sujata Vyas in Supp. of
21 Pl.'s Mot. for Summ. J. ("Pl.'s Mot. Decl.") ¶¶ 3-4,
22 ECF No. 128-4, she fails to establish how she knows
23 that Schwab placed the freeze on Plaintiff's 401(k)
24 Plan account. Therefore, the Court **SUSTAINS** Schwab's
25 objection to this statement.

26 Schwab objects to Plaintiff's statement that
27 "[n]either the Plan documents nor the QDROs and summary
28 plan documents mention any freeze as regards to the

1 401[k] plan." Schwab argues that whether the documents
2 mention a freeze is irrelevant to whether a freeze was
3 appropriate. Def.'s Evid. Objs. to Pl.'s Mot. 6.
4 However, if the documents did mention the ability to
5 place a freeze on the 401(k) Plan account or
6 specifically prohibited such an action, this is
7 relevant to the analysis of whether freezing the
8 account was appropriate. Therefore, the Court
9 **OVERRULES** Schwab's objection.

10 In Plaintiff's seventh uncontroverted fact, she
11 summarizes what she alleges Schwab did when allocating
12 the money in her Keogh Plan account and states that
13 this did not comply with the QDRO or Plan documents.
14 Pl.'s Stmt. of Uncontroverted Facts ¶ 7, ECF 128-6.
15 Schwab objects based on lack of personal knowledge.
16 Def.'s Evid. Objs. to Pl.'s Mot. 7. Plaintiff supports
17 these statements with her Declaration, but she fails to
18 show any personal knowledge of how Schwab allocated the
19 funds in Plaintiff's Keogh Plan account and whether
20 this was in violation of the QDRO or the Plan
21 documents. Therefore, the Court **SUSTAINS** Schwab's lack
22 of personal knowledge objection.

23 iii. *Bruce Pingree's Expert Report and*
24 *Deposition Transcript*

25 Schwab objects to the report of Plaintiff's expert,
26 Bruce Pingree, as well as the deposition transcript
27 from the second session of Mr. Pingree's deposition.
28 See Def.'s Opp'n to Pl.'s Mot. 10:25 n.9, ECF No. 138.

1 Schwab argues that the deposition transcript is
2 improper because it is an uncertified rough draft,
3 which is not meant to be cited in court proceedings.
4 Id. While Plaintiff did file the uncertified rough
5 draft of the transcript in support of her Motion, see
6 ECF No. 128-2, she filed the certified copy, along with
7 a declaration from Mr. Pingree attesting to the
8 authenticity of the transcript, with her Reply, see ECF
9 156-1. Therefore, the Court **OVERRULES as MOOT** Schwab's
10 objection.

11 Schwab also argues that Mr. Pingree's report is
12 inadmissible because the report itself is unsigned and
13 contains an additional signature page that Plaintiff
14 did not include when she originally disclosed the
15 report. Def.'s Opp'n 10:25 n.9. However, because
16 Plaintiff included the additional signature page with
17 the Report, see ECF No. 128-3, Schwab's argument is
18 irrelevant, and the Court **OVERRULES** Schwab's objection.
19 See Volterra Semiconductor Corp. v. Primarion, Inc.,
20 796 F. Supp. 2d 1025, 1038-39 (N.D. Cal. 2011)(holding
21 that an expert report need not be sworn in a separate
22 declaration by the expert).

23 b. *Evidence in Support of Plaintiff's Reply*

24 Schwab also submits evidentiary objections to the
25 evidence Plaintiff filed in support of her Reply to her
26 Motion. First, Schwab lists the evidence Plaintiff
27 filed in support of her Reply and states that the Court
28 should strike all of this evidence because a moving

1 party cannot submit new evidence in support of a reply.
2 See Def.'s Evid. Objs. to Pl.'s Reply 2:19-3:4, ECF No.
3 167. The first two exhibits Schwab lists as "new
4 evidence," ECF Nos. 156-1 and 156-2, are actually
5 duplicates of exhibits Plaintiff filed in support of
6 her Motion; these exhibits include Mr. Pingree's report
7 and the transcript from the second session of Mr.
8 Pingree's deposition.¹ Because Plaintiff already
9 included these exhibits in support of her Motion, they
10 are not "new evidence," and the Court **OVERRULES**
11 Schwab's objection to these exhibits.

12 The next exhibit to which Schwab objects is
13 Plaintiff's Declaration in support of her Reply.
14 According to Local Rule 7-10, a moving party may file
15 "declarations and other rebuttal evidence" in support
16 of the reply. Because the statements in Plaintiff's
17 Declaration go to the arguments she makes in her
18 Motion, they are rebuttal evidence, not new evidence,
19 and the Court **OVERRULES** Schwab's objection.

20 Schwab objects to the Department of Labor's ("DOL")
21 position on directed trustees and case law on directed
22 trustees. Def.'s Evid. Objs. to Pl.'s Reply 2:9-18.
23 Plaintiff does not argue in her Motion that Schwab was
24 a directed trustee, nor does Schwab argue such in its

26 ¹ Plaintiff includes the certified copy of the transcript of
27 the second session of Mr. Pingree's deposition as an exhibit to
28 her Reply, while she included the uncertified copy as an exhibit
to her Motion. However, this does not make the deposition
transcript "new evidence."

1 Opposition. Therefore, Plaintiff's argument in her
2 Reply that Schwab is a directed trustee with a
3 fiduciary duty to the Plans is an entirely new
4 argument. Plaintiff argues in her response to Schwab's
5 objections that Schwab included the Services Agreements
6 that state Schwab was a directed trustee, and
7 therefore, her "directed trustee" exhibits are rebuttal
8 evidence. Pl.'s Opp'n to Def.'s Evid. Objs. to Pl.'s
9 Reply ("Pl.'s Objs. Opp'n") 14:6-18, ECF No. 169.
10 However, like the rest of Plaintiff's tenuous arguments
11 in her thirty-page opposition to Schwab's objections,
12 which she mistakenly calls "broiler plate," this
13 argument holds very little weight. Nowhere in its
14 Opposition does Schwab argue that it is a "directed
15 trustee." Schwab's primary argument is that it is not
16 a fiduciary to the Plans and therefore cannot be liable
17 for a breach of fiduciary duty. This argument is
18 Plaintiff's alone—an argument she waits until her Reply
19 to make. Accordingly, the Court **SUSTAINS** Schwab's
20 objections to the evidence Plaintiff files in support
21 of her directed trustee argument [158, 159, 159-1].
22 Graves v. Arpaio, 623 F.3d 1043, 1048 (9th Cir.
23 2010)("[A]rguments raised for the first time in a reply
24 brief are waived.").²

25 Schwab also objects, based on lack of personal
26

27 ² As noted below, the Court considers the DOL Bulletin on
28 directed trustees, which Plaintiff includes as an exhibit to her
Opposition to Schwab's Motion.

1 knowledge and hearsay, to Plaintiff's Declaration filed
2 in support of her Reply. Def.'s Evid. Objs. to Pl.'s
3 Reply 3:9-12. With regards to the statements Plaintiff
4 makes about the 401(k) Plan, Plaintiff has established
5 personal knowledge to show that her 401(k) Plan account
6 was frozen when she tried to access it. See Pl.'s
7 Decl. in Supp. of Pl.'s Reply ("Pl.'s Reply Decl.")
8 2:12-14, ECF No. 157. However, the remaining
9 statements regarding the 401(k) Plan account are
10 irrelevant to the analysis of Plaintiff's claim that
11 the 401(k) Plan account freeze was improper, and the
12 Court does not consider these statements. See id. at
13 2:15-3:3. The Court therefore **SUSTAINS in part and**
14 **OVERRULES in part** Schwab's objections to the statements
15 in Plaintiff's Declaration regarding the 401(k) Plan.

16 With regards to the statements in Plaintiff's
17 Declaration about the expert witness deposition fees
18 and interpleader action, these statements are
19 irrelevant to the analysis of Plaintiff's claims of a
20 breach of fiduciary duty, and the Court does not
21 consider these irrelevant statements. The Court
22 therefore **SUSTAINS** Schwab's objections to these
23 statements. See id. at 3:5-22.

24 With regards to the statements Plaintiff makes
25 about the allocation of funds in her Keogh Plan
26 account, Plaintiff has not provided any foundation for
27 her personal knowledge of these statements.
28 Accordingly, the Court **SUSTAINS** Schwab's objections to

1 these statements. See id. at 3:24-4:4.

2 Schwab also objects to Mr. Pingree's report and
3 deposition testimony regarding whether Schwab is a
4 fiduciary because such statements are legal
5 conclusions. Def.'s Evid. Objs. to Pl.'s Reply 4:1-3.
6 Mr. Pingree concludes that Schwab was a fiduciary and
7 that it breached its duties to Plaintiff by
8 implementing the freeze on Plaintiff's 401(k) Plan
9 account and improperly allocating the funds in the
10 Keogh Plan account. See Expert Report of Bruce Pingree
11 ("Expert Report") 8, ECF No. 128-3. Such conclusions
12 go to the ultimate question in this matter and are thus
13 inadmissible legal conclusions. Harris v. Key Bank
14 Nat'l Ass'n, 193 F. Supp. 2d 707, 716 (W.D.N.Y.
15 2002)("[An expert's] opinion that the bank owed
16 plaintiffs a fiduciary duty and that it breached that
17 duty . . . [is] inadmissible in any event."); see
18 Levinson v. Westport Nat'l Bank, No. 3:09-cv-00269
19 (VLB), 2012 U.S. Dist. LEXIS 140909, at *18 (D. Conn.
20 Sep. 28, 2012). The Court **SUSTAINS** Schwab's objections
21 to the legal conclusions in Mr. Pingree's expert report
22 and deposition testimony.

23 3. Plaintiff's Evidentiary Objections to Schwab's
24 Sealed Documents

25 In her Opposition, Plaintiff objects to the
26 Services Agreements Schwab includes as sealed exhibits
27 in support of its Motion. See McGlynn Decl., Exs. 4,
28 5. Plaintiff objects based on the fact that Schwab did

1 not provide these Agreements with its Initial
2 Disclosures and the first time Plaintiff saw these
3 Agreements was when Schwab filed its Motion. Pl.'s
4 Opp'n 18:19-25. However, as Schwab states in its
5 Reply, Plaintiff did not agree to a protective order
6 through which the Services Agreements would be produced
7 until after Mr. Pingree's August 15, 2017 deposition.
8 Def.'s Reply 7:8 n.3. Therefore, after the parties
9 reached an agreement regarding the protective order,
10 Schwab produced to Plaintiff an unsealed copy of the
11 Services Agreements in conjunction with its Motion.
12 Id. The delay in production appears to be Plaintiff's
13 fault, and she cannot complain that Schwab did not
14 produce the Services Agreements earlier when her
15 counsel significantly delayed in agreeing to the
16 protective order, which would protect the
17 confidentiality of these Services Agreements.
18 Accordingly, Plaintiff's objection to the sealed
19 Services Agreements is **OVERRULED**.

20 4. The Court Deems Schwab's Material Facts as
21 Admitted Without Controversy

22 As a preliminary matter, Schwab, in its Reply,
23 argues that because Plaintiff failed to file a
24 Statement of Genuine Disputes in violation of Local
25 Rule 56-2, the Court may assume the material facts
26 Schwab provided are admitted without controversy.
27 Def.'s Reply 4:15-5:1. District courts in the Central
28 District of California have held that where an opposing

1 party fails to file a statement of genuine issues, "the
2 opposition is deemed 'not [to] raise a triable issue of
3 material fact as to [the] claims' on which the moving
4 party seeks summary judgment." Deirmenjian v. Deutsche
5 Bank, A.G., No. CV 06-00774 MMM (CWx), 2010 U.S. Dist.
6 LEXIS 86957, at *27 (C.D. Cal. July 30, 2010)(quoting
7 White v. Donley, No. CV 05-7728 ABC (FMOx), 2008 U.S.
8 Dist. LEXIS 79098, at *1 (C.D. Cal. Sept. 4, 2008));
9 see Green v. Wiard, No. CV 12-9251 JVS (AJW), 2015 U.S.
10 Dist. LEXIS 149910, at *5 (C.D. Cal. Sept. 3, 2015).

11 Plaintiff failed to file a Statement of Genuine
12 Disputes in conjunction with her Opposition to Schwab's
13 Motion. Plaintiff instead filed a Statement of
14 Uncontroverted Facts [139-1]. However, none of these
15 Uncontroverted Facts dispute the facts Schwab includes
16 in its Statement of Uncontroverted Facts. Accordingly,
17 the Court deems the facts in Schwab's Statement of
18 Uncontroverted Facts as undisputed when analyzing the
19 merits of Schwab's Motion.

20 4. Schwab's Motion is **GRANTED**, and Plaintiff's
21 Motion is **DENIED**

22 The Court turns to the merits of Plaintiff's and
23 Schwab's Motions. In her SAC, Plaintiff alleges three
24 counts against Schwab, none of which she specifically
25 names. All three of these counts assert breaches of
26 fiduciary duties related to Schwab's alleged freezing
27 of the assets in Plaintiff's 401(k) Plan account and
28 transferring Plaintiff's separate property in her Keogh

1 Plan account to Defendant Vyas.³

2 a. *Breach of Fiduciary Duty under ERISA*

3 Plaintiff seeks to impose personal liability on
4 Schwab pursuant to three sections of ERISA, sections
5 1109, 1132(a)(2), and 1132(a)(3), based on Schwab's
6 alleged freezing of Plaintiff's 401(k) Plan account.
7 See SAC ¶¶ 56, 58. While this Court has jurisdiction
8 to adjudicate Plaintiff's claims against Schwab
9 premised on the alleged freeze of Plaintiff's 401(k)
10 Plan account, Plaintiff cannot prevail on such claims
11 because ERISA does not allow plan participants to bring
12 breach of fiduciary duty claims to remedy individual
13 wrongs. Horan v. Kaiser Steel Ret. Plan, 947 F.2d
14 1412, 1417 (9th Cir. 1991).

15 An individual beneficiary or participant may bring
16 a claim for breach of fiduciary duty, but the

18 ³ Plaintiff's primary argument regarding Schwab's
19 distribution of the assets in her Keogh Plan account is that
20 Schwab did not follow the distribution instructions contained in
21 the Keogh Plan QDRO when it distributed her separate property
22 cash from her self-directed fund account to Defendant Vyas when
23 there were sufficient funds in the non-directed fund accounts.
24 See Pl.'s Mot. 20:19-25; Pl.'s Mot. Decl. ¶ 6. The Keogh QDRO
25 states that it retains jurisdiction over the enforcement of the
26 QDRO, see RJN, Ex. 3 at 3, and case law provides that enforcement
27 of QDROs is within the jurisdiction of the state court, see Green
28 v. Green, 899 F. Supp. 2d 291, 298-99 (D. N.J. 2012).
Plaintiff's claims relating to Schwab's distribution of Keogh
Plan funds in violation of the language of the QDRO are within
the jurisdiction of the state court. Plaintiff has failed to
provide any evidence of violations of ERISA based on this
conduct, and therefore, the Court **GRANTS** Schwab's Motion and
DENIES Plaintiff's Motion on Counts IV, IX, and X to the extent
they are premised on the allocation of funds in Plaintiff's Keogh
Plan account.

1 beneficiary or participant "must do so for the benefit
2 of the plan." Id. (citing Mass. Mutual Life Ins. v.
3 Russell, 473 U.S. 134, 144 (1985)). The Ninth Circuit
4 has long held that "[a]ny recovery for a violation of
5 [sections 1109, 1132(a)(2), and 1132(a)(3)] must be on
6 behalf of the plan as a whole, rather than inuring to
7 individual beneficiaries." Id. at 1418; see Sokol v.
8 Bernstein, 803 F.2d 532, 536 (9th Cir. 1986). This is
9 because "the fiduciary duty provisions in ERISA are
10 primarily concerned with protecting the integrity of
11 the plan, which in turn protects all beneficiaries,
12 rather than remedying each wrong suffered by individual
13 beneficiaries." Horan, 947 F.2d at 1418; Farr v. US
14 W., Inc., 58 F.3d 1361, 1364 (9th Cir. 1995).

15 Here, Plaintiff asserts her claims for breach of
16 fiduciary duty based on Schwab's alleged freezing of
17 Plaintiff's individual 401(k) Plan account. The only
18 relief she seeks is attorneys' fees and costs. Mot.
19 21:21-22. Therefore, there can be no dispute that
20 Plaintiff's claims are individual and are not sought
21 for the benefit of the plan as a whole; the award of
22 attorneys' fees and costs to Plaintiff will do nothing
23 to benefit the Plan as a whole. The law in this
24 Circuit is clear: relief is limited to "protecting the
25 integrity of the plan as a whole and does not extend to
26 individual plan participants." Williams v.
27 Caterpillar, Inc., 944 F.2d 658, 665 (9th Cir.
28 1991)(citations omitted). Like the plaintiffs in the

1 above-cited cases, Plaintiff "fail[s] to present a
2 fiduciary breach claim [because] the only remedy sought
3 is for [her] own benefit, rather than for the benefit
4 of the Plan as a whole." Horan, 947 F.2d at 1418;
5 Farr, 58 F.3d at 1364. Consequently, the Court **GRANTS**
6 Schwab's Motion and **DENIES** Plaintiff's Motion as to
7 Plaintiff's claims based on Schwab's alleged freezing
8 of Plaintiff's 401(k) Plan account.⁴

9 Even if Plaintiff could proceed on her individual
10 breach of fiduciary duty claims, Plaintiff has failed
11 to show that no genuine issue of material fact exists
12 as to whether Schwab was acting as a fiduciary when it
13 implemented the freeze on Plaintiff's 401(k) Plan
14 account. ERISA defines a "fiduciary" as follows:

15 [A] person is a fiduciary with respect to a plan
16 to the extent (i) he exercises any discretionary
17 authority or discretionary control respecting
18 management of such plan or exercises any
19 authority or control respecting management or
disposition of its assets, . . . [or] (iii) he
has any discretionary authority or discretionary
responsibility in the administration of such
plan.

20 29 U.S.C. § 1002(21)(A).

21 The determination of whether a person is a
22 fiduciary depends on "'actions, not the official
23

24 ⁴ Even if Plaintiff's claims regarding Schwab's distribution
25 of the Keogh Plan assets were not within the exclusive
26 jurisdiction of the state court, Plaintiff still could not
27 proceed on these claims because distribution of Plaintiff's
28 assets is an individual claim that does not benefit the Plan as a
whole. Further, the only relief Plaintiff seeks under these
claims is attorneys' fees, a remedy that would only benefit
Plaintiff.

1 designation of his role' . . . regardless of what his
2 agreed-upon contractual responsibilities may be." CSA
3 401(k) Plan v. Pension Prof'ls, Inc., 195 F.3d 1135,
4 1138 (9th Cir. 1999)(quoting IT Corp. v. Gen. Am. Life
5 Ins., 107 F.3d 1415, 1419 (9th Cir. 1995)). However,
6 "persons who have no power to make decisions as to plan
7 policy interpretations, practices or procedures but who
8 perform specific administrative functions within a
9 framework of policies, interpretations, rules,
10 practices and procedures made by others are not deemed
11 fiduciaries of the plan." Id. at 1139.

12 Importantly, "'a person may be an ERISA fiduciary
13 with respect to certain matters but not others';
14 fiduciary status exists only 'to the extent' that the
15 person 'has or exercises the described authority or
16 responsibility' over a plan." Coulter v. Morgan
17 Stanley & Co., 753 F.3d 361, 366 (2d Cir. 2014)(quoting
18 F.H. Krear & Co. v. Nineteen Named Trs., 810 F.2d 1250,
19 1259 (2d Cir. 1987)). "In every case charging breach
20 of ERISA fiduciary duty . . . the threshold question is
21 . . . whether that person was acting as a fiduciary
22 (that is, was performing a fiduciary function) when
23 taking the action subject to complaint." Pegram v.
24 Herdrich, 530 U.S. 211, 226 (2000).

25 Plaintiff has not provided any evidence to show
26 that Schwab was responsible for putting the freeze in
27 place and thus acted as a fiduciary in doing so. In
28 fact, Schwab has provided a Declaration from Cathleen

1 Morisako, Benefits Consultant at SCPMG and authorized
2 representative of SCPMG Retirement Committee, the Plan
3 Administrator for the 401(k) Plan, in which Ms.
4 Morisako states that she instructed Stacey Worrell of
5 Schwab to place the freeze on Plaintiff's 401(k) Plan
6 account. Morisako Decl. ¶ 2. Therefore, in
7 implementing the freeze, Schwab was following the
8 instructions of the Plan Administrator.

9 Plaintiff's expert supports this in his testimony,
10 where he stated, "it certainly appears that Schwab in
11 no sense originated the freeze." Pingree Dep. 107:14-
12 15. He then continues to base his opinion that Schwab
13 committed a breach of its fiduciary duty on the fact
14 that Schwab "followed a freeze not provided for in the
15 plan or the QDRO procedures." Id. at 107:15-17.
16 However, as explained, to be a fiduciary, Schwab must
17 exercise "discretionary authority . . . respecting
18 management or disposition of [the Plan's] assets." 29
19 U.S.C. § 1002(21)(A). There is no evidence that Schwab
20 exercised any discretion in implementing the freeze; it
21 simply followed the instructions of the Plan
22 Administrator. Therefore, Schwab was not acting as a
23 fiduciary when it implemented the freeze on Plaintiff's
24 401(k) Plan account. Because the inquiry in a breach
25 of fiduciary duty claim focuses on the specific action
26 at issue, the freezing of Plaintiff's 401(k) Plan
27 account, Schwab's other actions in regards to
28 management of the 401(k) Plan and whether those actions

1 established Schwab as a fiduciary are irrelevant to the
2 analysis of the parties' motions. See F.H. Krear, 810
3 F.2d at 1259.

4 Then, assuming Schwab was not a fiduciary,
5 Plaintiff argues that Schwab was a directed trustee of
6 the 401(k) Plan through which Schwab can still be
7 liable for a breach of fiduciary duty. Pl.'s Opp'n
8 16:13-19. The Services Agreement between SCPMG
9 Retirement Committee and Schwab states that Schwab "is
10 a directed, nondiscretionary Trustee or Custodian of
11 the Plan." McGlynn Decl., Ex. 4 at 11. The Services
12 Agreement also states that Schwab "has no discretionary
13 authority over the [401(k)] Plan or discretionary
14 authority over the administration of Plan Assets." Id.
15 Further, while Schwab "execute[s] various transactions
16 involving the Plan," it does so "only after receiving
17 the appropriate direction from" SCPMG Retirement
18 Committee. Id.

19 "ERISA relieves a trustee from fiduciary
20 obligations regarding the management and control of a
21 plan's assets when the trustee is 'directed' by the
22 plan's designated fiduciaries." Wright v. Or.
23 Metallurgical Corp., 360 F.3d 1090, 1103 (9th Cir.
24 2004). Directed trustees can only be held liable for
25 following a plan administrator's instructions if the
26 instructions were contrary to the terms of the plan or
27
28

1 ERISA.⁵ Id. (citing In re WorldCom, Inc., 263 F. Supp.
2 2d 745, 761 (S.D.N.Y. 2003)).

3 In determining whether the instruction from the
4 Plan Administrator was contrary to the terms of the
5 401(k) Plan, the DOL has stated "that a direction is
6 consistent with the terms of a plan if the documents
7 pursuant to which the plan is established and operated
8 do not prohibit the direction."⁶ See U.S. Department of
9 Labor, In the Context of Publicly Traded Securities,
10 What Are the Fiduciary Responsibilities of a Directed
11 Trustee?, Field Assistance Bulletin 2004-03 (Dec. 17,

12
13
14
15 ⁵ Cases in which the plaintiff asserts breach of fiduciary
16 duty claims against a directed trustee typically involve the
17 directed trustee following a plan fiduciary's investment
18 instructions. See Wright, 360 F.3d at 1103; In re WorldCom, Inc.
19 ERISA Litig., 354 F. Supp. 2d 423, 449 (S.D.N.Y. 2005). Here,
20 however, Schwab was not following investment instructions;
21 rather, Schwab simply followed the Plan Administrator's
22 instruction to freeze Plaintiff's 401(k) Plan account.
23 Therefore, while helpful in providing guidance as to the
24 potential for liability of a directed trustee, these cases are
25 not particularly analogous to the factual situation here.

26
27 ⁶ When an agency sets forth its opinion in the form of a
28 bulletin regarding a statute, such a bulletin, while not
controlling, has the "power to persuade." Skidmore v. Swift &
Co., 323 U.S. 134, 140 (1944). Plaintiff includes this Bulletin
as an exhibit to her Opposition to Schwab's Motion. See ECF No.
152-3. As noted, while it is helpful to see the DOL's position
on the duties of directed trustees and the potential for
liability, the Bulletin focuses on directed trustees' duties with
regards to buying, selling, and holding publicly traded
securities. The DOL's opinion is thus not particularly
enlightening with regards to the Plan Administrator's instruction
to freeze Plaintiff's 401(k) Plan account because of the pending
litigation.

1 2004) ("Bulletin").⁷

2 Here, Plaintiff continuously argues that placing
3 the freeze on her 401(k) Plan account was a violation
4 of the 401(k) Plan documents and "Schwab had no
5 authority to act outside of the 401(k) Plan as there
6 was no authority to place a freeze on the account."
7 Pl.'s Opp'n 16:25-17:1. However, Plaintiff has
8 provided no evidence that the language of the 401(k)
9 Plan prohibited placing a freeze on Plaintiff's account
10 during litigation that concerned the 401(k) Plan.
11 While it is true that neither the 401(k) Plan documents
12 nor the 401(k) Plan QDRO specifically provided for
13 freezing Plaintiff's 401(k) Plan account, Plaintiff's
14 argument ends there. She provides no statute or case
15 law that suggests engaging in an action for which the
16 Plan documents do not specifically provide is a
17 violation of the Plan or ERISA. As the DOL stated in
18 the Bulletin upon which Plaintiff relies, a direction
19 from the Plan Administrator is consistent with the Plan
20 if the Plan does not prohibit such a direction. See
21 Bulletin. The 401(k) Plan documents did not prohibit a
22 freeze on Plaintiff's 401(k) Plan account. Therefore,
23 Plaintiff has failed to raise a genuine issue of
24 material fact regarding Schwab's alleged violation of

25
26 ⁷ While the Court has sustained Schwab's objection to this
27 evidence as "new evidence" filed in support of Plaintiff's Reply,
28 Plaintiff also includes the DOL's Bulletin as an exhibit in
support of her Opposition, which the Court considers. See ECF
No. 152-3.

1 the 401(k) Plan by following SCPMG Retirement
2 Committee's instruction.

3 Because SCPMG Retirement Committee's instruction to
4 freeze Plaintiff's 401(k) Plan account was not a
5 violation of the 401(k) Plan documents, Plaintiff must
6 provide evidence that the instruction was contrary to
7 ERISA. See Wright, 360 F.3d at 1103. While Plaintiff
8 argues that Schwab is liable as a directed trustee
9 under ERISA, she does not explain how the freezing of
10 her 401(k) Plan account was a violation of ERISA. In
11 fact, Plaintiff has not provided any evidence that
12 ERISA prohibits a freeze of a participant's account
13 while litigation involving the account is pending.
14 Therefore, Plaintiff has failed to prove that Schwab,
15 as an alleged directed trustee, breached a fiduciary
16 duty by following SCPMG Retirement Committee's
17 instruction to freeze Plaintiff's 401(k) Plan account.⁸
18 See In re McKesson HBOC, Inc. ERISA Litig., No.

19
20 ⁸ Plaintiff's last alternative argument is that Schwab was a
21 "party in interest" against whom Plaintiff can seek relief under
22 ERISA section 406(a)(1). Pl.'s Mot. 21:2-18. Section 406(a)(1)
23 prohibits a number of transactions between the party in interest
24 and the plan, including, as Plaintiff notes, lending of money
25 between the plan and the party in interest and transferring plan
26 assets to a party in interest. See Pl.'s Mot. 21:13-16 (citing
27 29 U.S.C. § 1106(a)(1)(B), (D)). Plaintiff has not provided any
28 evidence to suggest that Schwab was engaged in any sort of
prohibited transaction, such as those enumerated above, through
which Plaintiff could hold Schwab liable. See Nieto v. Ecker,
845 F.2d 868, 873 (9th Cir. 1988)(discussing potential liability
against party in interest when non-fiduciary received excessive
compensation for legal services and obtained a loan from the
retirement fund at issue). As such, the Court ignores this
irrelevant argument.

1 C00-20030 RMW, 2002 U.S. Dist. LEXIS 19473, at *39
2 (N.D. Cal. Sept. 30, 2002)(holding that absent facts to
3 show that defendant knew instruction was imprudent,
4 defendant could not be liable as a directed trustee).

5 Because no genuine issue of material fact exists as
6 to whether Schwab breached a fiduciary duty it owed to
7 Plaintiff when it followed SCPMG Retirement Committee's
8 instruction to freeze Plaintiff's 401(k) Plan account,
9 the Court **GRANTS** Schwab's Motion and **DENIES** Plaintiff's
10 Motion as to Plaintiff's breach of fiduciary duty
11 claims premised on the freezing of Plaintiff's 401(k)
12 Plan account.

13 **IV. CONCLUSION**

14 Based on the foregoing, the Court **GRANTS** Schwab's
15 Motion [125] in its entirety and **DENIES** Plaintiff's
16 Motion [126] in its entirety.

17 The only remaining Defendant in this matter is
18 Nancy Bunn. The Court's records reflect that Plaintiff
19 has not served Ms. Bunn with any iteration of the
20 Complaint, and therefore, pursuant to Federal Rule of
21 Civil Procedure 4(m), Defendant Nancy Bunn is dismissed
22 from this Action.

23
24 **IT IS SO ORDERED.**

25
26 DATED: October 13, 2017

s/ RONALD S.W. LEW

27 **HONORABLE RONALD S.W. LEW**
28 Senior U.S. District Judge